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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 464

O. C. WILEY & SONS, INCORPORATED,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT

This suit was filed by O. C. Wiley & Sons, Incorporated, on November 4, 1948, in the United States District Court for the Western District of Virginia, against the United States of America. The purpose of this suit was to have a special court of three judges to hear our petition about the Interstate Commerce Commission permitting Stuart Lumber Corporation to sell to John C. Fleming, Jr., operating rights that Stuart Lumber Corporation had previously contracted by a valid contract to sell to O. C. Wiley & Sons, Incorporated, and then to set aside, annul and forever

enjoin the Interstate Commerce Commission from permitting Stuart Lumber Corporation from selling to John C. Fleming, Jr., operating rights that Stuart Lumber Corporation had contracted by a valid contract to sell to O. C. Wiley & Sons, Incorporated, which transfer of operating rights was allowed by the provisions of the report and order dated June 18, 1948, entered in a proceeding before the Commission, known as Docket No. MC-3774, John C. Fleming, Jr.—Purchase—Stuart Lumber Corporation. The reasons why the report and order should be set aside, annulled and the permissive authority therein granted forever withdrawn, among others, are that the Commission did not leave the question of the contract between Wiley and Stuart for settlement by the courts because the Commission did, before the State Court could pass upon the validity of the contract between Wiley and Stuart, authorize Stuart Lumber Corporation to sell to John C. Fleming, Jr., the operating rights Stuart had (by a valid contract) contracted to sell to O. C. Wiley & Sons, Incorporated, and, had the Commission not considered or approved the application of Stuart and Fleming prior to the judgment of the State Court on the question of the contract between Stuart and Wiley, this proceeding would have never been necessary, because the State Court found that a valid contract of purchase was made between Wiley and Stuart. Consequently, Wiley could have, no doubt, required specific performance in the State Courts had it not been for the action of the Commission in this proceeding; that the action of the Commission in opposing this suit and approving the application of Stuart and Fleming, in the premises, is an unjustifiable interference with the property rights of O. C. Wiley & Sons, Incorporated, and amounts to the taking of property without due process of law; that the Commission cannot be heard to say that its action in the premises is proper, since the State Court has found that Stuart and Wiley made a valid

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contract and that court action of Wiley was taken in compliance with what the Commission has said about the enforcement of contracts as follows: "All matters involving the interpretation of contracts and the enforcement of the terms thereof must be left for settlement between the parties themselves or by the courts"; that the Commission, since it has control over these operating rights, should never permit a holder of those rights to use the Commission for the purpose of inflicting damage upon another for the gain of the owner of the operating rights; that the Commission, when it receives notice that the owner of operating rights has sold the same operating rights to two parties, should refuse to act in the premises until the Court has determined the rights of the parties, thus preventing an owner of such rights from inflicting injury and damage; and that the Commission should not aid or hinder either party or do any act that will prejudice or prefer either party.

The jurisdiction of the three-judge District Court rests upon the provisions of the Acts of Congress approved June 25, 1948 (c. 646, 62 Stat. 869) Sections 2284 and 2325, Title 29, United States Code, Judiciary and Judicial Procedure.

The decision of the Interstate Commerce Commission here considered, is a decision of the kind that is to be heard and determined by a district court of three judges. Consequently, the decision of the court in this proceeding is the kind of a decision from which an appeal to the Supreme Court is allowed by Section 1253, Title 28, United States Code, "Judiciary and Judicial Procedure". The jurisdiction of the Supreme Court of the United States over this suit on appeal is allowed by Section 1253, Title 28, United States Code, as that section provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocu-

tory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

This is a suit that must be heard and determined by a district court of three judges, as Section 2325, Title 28, United States Code, provides as follows:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title."

Then, Section 2101, Title 28, United States Code, provides, in part, as follows:

"(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253, and 2282 of this title, holding unconstitutional in whole or in part, any act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. * * *

"(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree appealed from, if interlocutory, and within sixty days if final."

The decision and order appealed from were rendered and entered on the 3rd day of September, 1949, and the petition for leave to take an appeal, with assignment of errors, was filed on the 1st day of November, 1949, or filed within the sixty day period allowed by Section 2101(b), Title 28, United States Code.

The District Court, we believe, erred as a matter of law, in refusing to grant the prayer of plaintiff for an order

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annulling, setting aside and forever enjoining the report and order of the Interstate Commerce Commission, dated June 18, 1948, on the ground that said order, as plaintiff alleges, is unlawful and contrary to the Interstate Commerce Act (49 U. S. C. A).

The decision of this Court in this proceeding should be reviewed by the Supreme Court of the United States and this Honorable Court decree whether or not the Commission can or should permit or authorize an owner of operating rights to transfer those operating rights to one party, when as here, the owner has contracted to sell the same operating rights to two parties and whether or not an owner of operating rights is a common carrier, within the provisions of Sections 5(2) (a) (49 U. S. C. A. 5(2) (a)) so as to permit the Commission to approve the transfer of the operating rights to one of the two parties to the injury and damage of the other one of the two parties and this proceeding should be reviewed for the purpose of determining whether or not the Commission can act so as to take the property of another without due process of law.

The decision appealed from is contrary to law, as it sustains the proposition that the Commission can use its power so as to permit the owner of operating rights to contract to sell the same operating rights to two parties and then use the office of the Commission for the purpose of selecting and completing the sale to one party to the detriment of the other party.

The decision appealed from is contrary to law, as it sustains the proposition that the Commission need not wait before approving the sale and transfer of operating rights until the rights of the parties have been determined by the Courts in instances where, as here, the owner has contracted to sell the same operating rights to two parties.

The decision appealed from is contrary to law, as the record shows that Stuart made a valid contract with Wiley

to sell the considered operating rights to Wiley, and since operating rights are unique and those rights are within the complete control of the Commission, the action of the Court in not recognizing the contract was error and the Supreme Court should review this proceeding on that ground, as well as on the other grounds.

The questions involved in this proceeding are all substantial. One of the questions involves the right of the Commission to take away the property of one party without due process of law, which has been done to O. C. Wiley & Sons, as the rights Wiley contracted to purchase were given to Fleming.

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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, LYNCHBURG DIVISION

Civil Action No. 198

O. C. WILEY & SONS, INCORPORATED, *Plaintiff*,

vs.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant*

(Argued August 30, 1949. Decided Sep. 3, 1949)

Before DOBIE, Circuit Judge, and PAUL and BARKSDALE, District Judges

W. G. Burnette, Esq., Lynchburg, Va., attorney for plaintiff, Herbert A. Bergson, Esq., Assistant Attorney General, William D. McFarlane, Special Assistant to the Attorney General, James Kilday, Special Assistant to the Attorney General, Edward Dumbauld, Esq., Special Assistant to the Attorney General, of Washington, D. C., and Howard C. Gilmer, Jr., Esq., United States Attorney, Roanoke, Va., counsel for the United States.

D. W. Knowlton, Esq., and Samuel R. Howell, Esq., attorneys for the Interstate Commerce Commission.

DOBIE, *Circuit Judge:*

Stuart Lumber Corporation (hereinafter called Stuart) entered into a contract with O. C. Wiley & Sons, Incorporated, (hereinafter called Wiley) under which, for a consideration of $1,000.00, Stuart agreed to transfer to Wiley certain operating rights which Stuart, as a motor carrier, had under a certificate of the Interstate Commerce Commis-

sion (hereinafter called the Commission). Later, in spite of this contract, Stuart, apparently for a larger consideration than that specified in the Stuart-Wiley contract, agreed to transfer these same operating rights to John C. Fleming, Jr., (hereinafter called Fleming.)

Upon an application filed with the Commission by Stuart and Fleming, the Commission (Docket MC—3774, John C. Fleming, Jr.—Purchase—Stuart Lumber Corporation) entered an order on June 18, 1948, permitting Stuart to sell and Fleming to buy these operating rights hitherto possessed by Stuart. Before the entry of this order, Wiley had (in writing to the Commission) protested its issuance on the ground of its contract with Stuart, which was prior to Stuart's contract with Fleming. The Commission, however, delayed final and definitive action until Wiley could establish, in a court of the State of Virginia, such rights, if any, that he might have against Stuart in the premises. Final action was also delayed by the Commission in order that our Court might pass on the instant civil action, instituted in the District Court of the United States for the Western District of Virginia, asking us to annul, set aside or suspend the order of the Commission authorizing the transfer by Stuart of its operating rights to Fleming.

Wiley, accordingly, filed a suit in the Circuit Court of the City of Lynchburg, Virginia, against Stuart asking for specific performance by Stuart of its contract to transfer to Wiley the operating rights of Stuart. Under the utterly antiquated and absolute outsworn practice in the states courts of Virginia (to which Virginia lawyers so dearly and so lovingly cling) there is a clear separation of law and equity. The Virginia court held that it could not decree specific performance here and transferred the case to the law side of the court. It there proceeded as an action at law for damages arising from a breach of contract. And, in accordance with a verdict of the jury, which fixed these damages at $300.00, a money judgment for that amount was entered by the Virginia court in favor of Wiley and against Stuart.

We append certain opposite provisions of the Federal Interstate Commerce Act.

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Section 5 (2) reads (in part) as follows:

"(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) * * * for any carrier, or two or more carriers jointly, *to purchase,* lease, or contract, to operate the properties, or any part thereof, of another; * * *

(b) Whenever a transaction is proposed under subparagraph (a), *the carrier or carriers or person seeking authority therefor shall present an application to the Commission,* and thereupon the Commission * * * shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the finding specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. *If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of sub-paragraph (a) and will be consistent with the public interest it shall enter an order approving and authoriznig such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable."* (Italics supplied.)

Section 5(4) provides:

"It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of sub-paragraph (a) * * *."

Section 5(11) provides:

"The authority conferred by this section shall be exclusive and plenary, * * *.

Wiley contends that the Commission should not have entered the order in question approving the transfer by Stuart of its operating rights to Fleming until a determina-

tion of the rights, if any, of Wiley under the contract between Wiley and Stuart. The Commission has repeatedly held that its orders approving such transfers are permissive only, that the Commission is not a court and must leave to the courts the determination of such alleged conflicting rights between the parties, and that the Commission will not, upon the mere assertion of an adverse claim, hold up indefinitely its decision on such applications—a procedure which would, in many cases, result in almost an interminable delay. See, Raymond Bros. Motor Transportation, Inc.—Purchase—Borzel, 15 M. C. C. 477; Harris Bros. Transfer Co.—Purchase—Glosson—Hancock, 25 M. C. C. 645; Marion Trucking Co.—Purchase—Harwood Trucking, 45 M. C. C. 377.

The great weight to be attributed to the Commission's interpretation of Section 5(2) of the Interstate Commerce Act has frequently been attested by the Supreme Court. See, United States *v.* American Trucking Associations, 310 U. S. 534, Colgate-Palmolive-Peet Co. *v.* United States, 320 U. S. 422, 426; United States *v.* Jackson, 280 U. S. 183, 193; New York Central Securities Corp. *v.* United States, 287 U. S. 12, 27; McLean Trucking Co. *v.* United States, 321 U. S. 67, 87-89.

Wiley strongly contends that the Commission should not, and could not, approve the transfer by Stuart to Fleming of the Stuart operating rights because, at the time of this transfer, these rights were owned by Wiley and not by Stuart. There are two obvious answers to this contention. The Stuart-Wiley contract in terms was not even an attempted executed transfer of the Stuart rights to Wiley; it was, at best, no more than an executory contract providing that Stuart would transfer (which it never did) these rights to Wiley in the future. And no transfer by Stuart to Wiley of these rights could be effective (under the provisions of the Interstate Commerce Act cited above) without the permission of the Commission.

It is not for us to speculate on the correctness (or lack of it) of the decision of the Virginia court in the suit brought therein by Wiley against Stuart. For our purposes, that decision is *res adjudicata* in its determination that Wiley was not entitled to specific performance by Stuart of the

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Stuart-Wiley contract. And, when Wiley permitted this case to proceed as an action at law, resulting in a mere judgment for money damages for a breach of this contract by Stuart, without any appeal by Wiley, all of Wiley's rights under this contract became merged in the judgment. It is thus at least open to serious question whether our setting aside of the Commission's order that is before us would in any way be helpful to Wiley.

It must be remembered that Wiley filed no application with the Commission as required by Section 5 (2) (b) of the Interstate Commerce Act, and made no allegations either before the Commission or in this Court that the action of the Commission in approving the transfer: (1) was not in the public interest; (2) was not within the scope of Section 5 (2); and (3) the terms and conditions of the purchase were unjust and unreasonable as between the parties. It has been often recognized that Section 5 confers broader authority and greater administrative discretion than most any other section of the Act and that the legislative history of the recent amendments to this section of the Act show congressional intent to broaden the authority of the Commission. We are, accordingly, of the opinion that the Commission's report and order, approving the transfer upon terms and conditions found to be just and reasonable and consistent with the public interest, should not be set aside.

The primary concern of the Commission here is the protection of the public interest. It has been repeatedly held that a very strong showing must be made (and here there is no such showing) by one who seeks to set aside an order of the Commission in this field. See, McLean Trucking Co. v. United States, 321 U. S. 67, 87-89; Texas v. United States, 292 U. S. 522, 531; Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541, 547-549; Alton Railroad Co. v. United States 315 U. S. 15, 23; Virginia Stage Lines v. United States, 48 F. Supp. 79; General Transportation Co. v. United States, 65 F. Supp. 981, affirmed 329 U. S. 668.

Wiley complains further that the Commission refused to hold a public hearing and denied Wiley's request for a further consideration or rehearing in this case. These are matters primarily vested in the sound discretion of the Com-

mission. And no adequate showing has been made that would justify us in interfering with the exercise by the Commission of this discretion in these matters.

For the reasons above set out in this opinion, we must decline to set aside, annul or suspend the instant order of the Commission, and the civil action of the plaintiff herein must be dismissed.

Dismissed.

I concur in the foregoing opinion.

JOHN PAUL,
Dist. Judge.

I dissent.

A. D. BARKSDALE,
U. S. District Judge.

Endorsed: Filed Sep. 3, 1949. G. E. Gentry, Clerk, by Louis H. Price, Deputy.

A Copy. Teste:

(S.) LOUIS H. PRICE,
Deputy Clerk.

(SEAL.)

AT A REGULAR TERM OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT LYNCHBURG, ON THE 3 DAY OF SEPTEMBER, 1949

Civil Action No. 198

O. C. WILEY & SONS, INCORPORATED, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant, and INTERSTATE COMMERCE COMMISSION, Intervening Defendant

ORDER

This action having been considered upon the complaint and answers of the defendants, and the amended complaint and answer thereto, and upon the exhibits submitted, and

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upon the arguments of counsel for all the parties heard herein on August 30, 1949;

And it being the opinion of the court, for reasons which have been stated in the opinion filed this day herein, that the prayers of said complaint and amended complaint to set aside and annual an order of the Interstate Commerce Commission dated June 18, 1948, in Docket MC-3774, John C. Fleming, Jr.—Purchase—Stuart Lumber Corporation, and a report of the Commission entered on the same day, are without merit:

Now, therefore, it is Ordered that the prayers of said complaint and amended complaint be, and they hereby are, denied, and that this action be, and the same is, hereby dismissed at the costs of the plaintiff:

To which action of the court in dismissing said action, the plaintiff, by counsel, duly objected and excepted for reasons fully stated to the court.

And the Clerk of this court shall certify and mail copies hereof, together with a copy of the court's opinion, to all counsel of record herein.

Enter:

(Signed) ARMISTEAD M. DOBIE,
United States Circuit Judge.
(Signed) JOHN PAUL,
United States District Judge.
(Signed) A. D. BARKSDALE,
United States District Judge.

A copy. Teste:

(Signed) LOUIS H. PRICE,
Deputy Clerk.

(SEAL.)

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CLERK

IN THE

Supreme Court of the United States

October Term, 1949

Case No. 464

O. C. WILEY & SONS, Incorporated,
Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA, et al,
Defendants-Appellees.

Brief of Appellant in Opposition to the Motion to Affirm, Filed by Appellees, The Interstate Commerce Commission and the Department of Justice

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IN THE

Supreme Court of the United States

October Term, 1949

Case No. 464

O. C. WILEY & SONS, INCORPORATED,
PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA, *et al.*,
DEFENDANTS-APPELLEES.

Brief of Appellant in Opposition to the Motion to Affirm, Filed by Appellees, The Interstate Commerce Commission and the Department of Justice.

This is a direct appeal from the final decision in Civil Action No. 198 (District Court for Western District of Virginia, Lynchburg Division), entered on September 3, 1949, by a specially constituted Court of three judges, established pursuant to Title 28, United States Code, dismissing appellant's petition for an order enjoining, setting aside and forever annulling the report and orders of the Interstate Commerce Commission dated June 18, 1948. The motion to affirm should be overruled and this Court should review this proceeding and grant appellant the relief sought. The orders of the Commission which the District Court affirmed should be set aside

because, among other things, (1) they interpret and enforce the provisions of a contract; (2) they take the property of appellant contrary to the due process clause; (3) they are contrary to the provisions of section 5 of the Act; and (4) they are otherwise unlawful.

STATEMENT

O. C. Wiley & Sons, Incorporated, entered into a contract with Stuart Lumber Corporation for the sale and purchase of the franchise of Stuart. However, before an application was made to the Commission for approval of the purchase and transfer of the franchise from Stuart to Wiley, a third person, John C. Fleming, Jr., entered the scene and offered Stuart $2,000.00 for the franchise, or $1,000.00 more than Stuart had agreed to sell the franchise to Wiley for, so the contract with Wiley was breached and the Commission has authorized the transfer from Stuart to Fleming of the franchise that Wiley should have and would have had, had the Commission refused to consider the application of Stuart and Fleming until the validity of the contract between Stuart and Wiley was determined. We are here seeking to get the franchise Wiley purchased.

CONTRACT IMPAIRED

It is claimed by appellees that the Commission is "not a court vested with authority to interpret and enforce the terms of contracts involving the sale of operating rights," and, therefore, the Commission is not concerned with the contract of sale entered into by Stuart Lumber Corporation and O. C. Wiley & Sons, Incorporated. The action of the Commission in considering the application of Stuart and Fleming before the validity of the contract between Stuart and Wiley had been determined was tantamount to interpreting the contract between Stuart and Wiley. Because the Commission, by indirection, has ruled that there was no valid contract between Stuart and Wiley, as the franchise, notwithstanding the valid contract of sale made by Stuart and Wiley, was awarded to Fleming. The application of Stuart and Fleming should have been held in abeyance pending final determination of the contract between Stuart and Wiley and the failure to hold

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that application in abeyance resulted in the Commission declaring that Wiley had to accept money damage in lieu of the franchise because the Commission directed that the franchise be given to Fleming, notwithstanding the contract between Stuart and Wiley. Clearly, by not giving Wiley sufficient time in which to establish the contract before awarding the franchise to Fleming, the Commission has, in fact and law, interpreted and enforced the terms of a contract without giving Wiley an opportunity to protect his interest. Not only did the Commission not consider the contract of sale between Wiley and Stuart but the Commission is here still trying to prevent Wiley from obtaining the franchise.

NO BROAD AND EXCLUSIVE ADMINISTRATIVE DISCRETION HERE

It is claimed that the Commission has broad and exclusive administrative discretion in passing upon consolidations, mergers, leases, purchases, and contracts to operate common carriers subject to the Act and, in support of that assertion of the claimed unlimited powers of the Commission, reference has been made to several Court decisions claimed to support that proposition. The claimed broad and exclusive administrative discretion is conferred upon the Commission ONLY if the transaction here considered is within the provisions of Section 5 of the Act (49 USCA 5) as paragraph 11 thereof reads, in part, as follows:

> "The authority conferred by this section shall be exclusive and plenary."

The transaction involved in this proceeding does not fall within the provisions of Section 5 of the Act because Section 5 (2) (a) of the Act provides, in part, as follows:

> "It shall be lawful with the approval and authorization of the Commission, as provided in subdivision (b) * for two or more carriers to consolidate or merge *their* properties or *franchises* * into one corporation *." (Emphasis added).

The referred to subdivision (b) provides, in part, as follows:

"Whenever a transaction is proposed under subparagraph (a) the carrier or carriers or person seeking authority therefor shall present an application to the Commission * *. *If the Commission finds that, * *, the proposed transaction is within the scope of subparagraph (a)* *, it shall enter an order approving and authorizing such transaction * *." (Emphasis added).

Subparagraph (a) of Section 5 (2) provides that two or more carriers may consolidate or merge *their* properties or *franchises* into one company. Consequently, we must determine if the application of Stuart and Fleming was within the scope of subparagraph (a) of Section 5 of the Act before we can know the kind of discretion the Commission has in the premises. In this proceeding, Stuart Lumber Corporation had *no franchise* to sell John C. Fleming, Jr., as Stuart Lumber Corporation was under a *binding contract of sale to sell and to convey its franchise* to O. C. Wiley & Sons, Incorporated, and the contract between Stuart and Wiley was binding, as the Circuit Court of Lynchburg held that the contract was valid. In that case, the jury found as follows: "We, the jury, on the issue joined, find for the plaintiff, and fix its damages at $300.00." Therefore, Stuart could not lawfully sell a franchise that he had sold to Wiley and Stuart could not convey title to the franchise to Fleming because Stuart was legally bound to convey the franchise to Wiley. Since the jury found that there was a binding contract of sale between Stuart and Wiley, the application of Stuart and Fleming was not such a transaction as to come within the scope of subparagraph (a) of Section 5 (2) of the Act, and the Commission is without power to act in the premises.

Whether or not the Stuart-Wiley contract became merged in the final judgment is of no concern to the Commission or to the District Court, as the Commission and the District Court were dealing with the question of whether or not Stuart had, *at the time (June 18, 1948) the Commission approved the application of Stuart and Fleming,* a franchise that he could lawfully sell to Fleming. The Circuit Court of Lynchburg held that Stuart and Wiley had made a binding contract of sale by which Stuart was to sell and Wiley to buy the franchise the Commission permitted Fleming to buy from Stuart. Con-

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sequently, the transaction involved in this proceeding is such a transaction as *not to come within the scope* of subparagraph (a) of Section 5 (2) of the Act. So, in fact and law, the orders of the Commission permitting Fleming to buy from Stuart the operating rights Stuart had contracted to sell to Wiley are null and void, and the decision of the Court is contrary to law.

RES ADJUDICATA

The motion to affirm contains the following:

> "Appellees submit that, as the district court held, the decision of the Virginia Court is res adjudicata in its determination, from which no appeal was taken, that appellant was not entitled to specific performance by Stuart of the Stuart-Wiley contract and that all of appellant's rights under this contract became merged in the final judgment."

If it be true, as claimed, which we deny, that the decision of the Virginia Court is res adjudicata in its determination that appellant (Wiley) was not entitled to specific performance, still that decision will not aid the appellees here nor make the transaction of Stuart and Fleming one within the scope of subparagraph (a) of Section 5 (2) of the Act, because when the Commission acted on the application of Stuart and Fleming, the State Court had not passed upon the suit. Consequently, the orders here involved have no relation to the action the State Court took on the question of specific performance, as the State Court could not grant specific performance.

The plea of res adjudicata is not available to appellees even if that plea were good, which we deny, *because the decision of the State Court was not an adjudication of the issue of whether or not the orders of the Commission in this proceeding are lawful and proper,* as that decision is an adjudication of the fact that Stuart had contracted to sell and Wiley had contracted to purchase the franchise of Stuart. Had the State Court decreed specific performance of the contract, the State Court was powerless to require the physical transfer of the franchise from Stuart to Wiley, as that transfer

can only be authorized by the Commission. Transfer of franchises, the appellees claim in their motion to affirm, can be made only as follows:

> "Moreover, there could have been no effective transfer of those rights to appellant without the permission of the Commission. Interstate Commerce Act, Sec 5 (2) (4)."

It is clear, by the admission of the appellees, that the State Court is powerless to decree specific performance of the contract between Stuart and Wiley and that the State Court could not require the transfer of the franchise from Stuart to Wiley. Therefore, since there could have been no effective transfer by the State Court of the franchise to appellant without the permission of the Commission, the State Court was not a court of competent jurisdiction to pass upon the issue of specific performance and the State Court, by appellees' own admission, is not a court of competent jurisdiction to grant specific performance, which admission and fact make the plea of res adjudicata untenable. Therefore, by the admission of appellees, the District Court erred in law by holding that the plea of res adjudicata was good and appellant barred from relief.

BY INDIRECTION

The decision of the State Court finding that a valid contract was made by Stuart Lumber Corporation and O. C. Wiley & Sons, Incorporated, by which Stuart agreed to sell and Wiley agreed to purchase the franchise of Stuart renders res adjudicata the question that Stuart *did not have a franchise* that he could *lawfully* sell to Fleming, and proves that the Stuart-Fleming transaction did not come within the scope of subparagraph (a) of Section 5 (2) of the Act. To prove that Wiley and Stuart were the proper parties under Section 5 (2) (a) of the Act and to prove that Stuart and Fleming were improper parties, since the Commission would not hear Wiley on the contract between Stuart and Wiley, and since the courts could not decree specific performance, appellant had to take judgment on the law side of the Court to prove that Wiley was lawfully entitled to the franchise. Since Wiley under the admission of appellees, could not obtain specific

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performance from the State Court and since specific performance of the contract was denied by the Commission, the Commission, *by indirection*, is therefore interpreting and enforcing a contract between Wiley and Stuart. The action of the Commission in proceeding to a final conclusion in this proceeding on the application of Stuart and Fleming is directly contrary to the specific instructions of the Commission as follows:

> "* that all matters involving the interpretation of contracts and the enforcement of the terms thereof, must be left for settlement between the parties themselves or by the Courts." (Page 3, Exhibit 1).

Since the State Court could not grant specific performance and since the Commission has not made it possible for Wiley to obtain the franchise, the action of the Commission has the force and effect of enforcing the terms and conditions of the contract of purchase entered into between Wiley and Stuart. The Commission is interpreting, enforcing and impairing the terms and conditions of a contract, *by indirection*, by requiring Wiley to accept money damage in lieu of the franchise when Wiley purchased or contracted to purchase the franchise itself.

CONCLUSION

The Supreme Court of the United States should review this proceeding and grant the relief sought. The question involved is substantial insofar as appellant is concerned, in that it involves a unique item, an item that cannot be obtained in the open market and a duplicate franchise can only be obtained by proof of public convenience and necessity. The decision of the District Court and the orders of the Commission are contrary to law and of fact in that Stuart and Fleming have been considered parties within the scope of subparagraph (a) of Section 5 (2) of the Act when there was a valid contract to purchase the franchise in existence between Wiley and Stuart; that the plea of res adjudicata, upon which the appellees rely, is erroneous and not tenable because the State Court was not a court of competent jurisdiction to decree specific performance; that the Commission, with the approval of the District Court, is using the provisions of Section 5 to interpret, impair and enforce contracts of sale; that the

failure of the Commission, which the District Court has approved, to wait and hold in suspense an application for transfer of a franchise until the dispute between the parties has been settled, takes the property of Wiley without due process of law; and the Commission, contrary to law, is permitting holders of franchises to enrich themselves by permitting them to sell twice the same franchise and then permitting them to choose the purchaser to whom they will convey the franchise.

The motion to affirm, in equity and law, should be overruled and this Honorable Court should grant a review and the relief here requested and for this we pray.

Respectfully submitted,

O. C. WILEY & SONS, INCORPORATED

By: W. G. BURNETTE,
Counsel.

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December 2, 1949

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, LYNCHBURG DIVISION

Civil No. 198

O. C. WILEY & SONS, INCORPORATED, APPELLANT,

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the judgment and decree of the District Court be affirmed.

This is a direct appeal from a final judgment and decree, entered on September 3, 1949,[1] by a specially constituted district court of three judges pursuant to Sections 1253, 2284 and 2325, Title 28 of the United States Code, dismissing appellant's

[1] The Court also rendered its opinion on September 3, 1949; one judge dissented without opinion.

complaint seeking to set aside an order of the Interstate Commerce Commission. Appeal was allowed on November 1, 1949, and appeal papers were served on November 2, 1949.

The Commission's order, dated June 18, 1948, authorized and approved the purchase by John C. Fleming, Jr. (hereinafter called Fleming) of the motor carrier operating rights of Stuart Lumber Corporation (hereinafter called Stuart) [2] pursuant to an application filed by the parties under Section 5(2) of the Interstate Commerce Act (49 U.S.C. Sec. 5(2)).[3]

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[2] The order in terms authorized and approved the purchase by Fleming of the operating rights of Stuart, which consisted of a certificate authorizing operations in interstate commerce as an irregular route motor carrier of general commodities, with certain exceptions, between points in Lunenburg, Mecklenburg, Halifax, Charlotte, Prince Edward and Nottoway Counties, Virginia, on the one hand, and on the other, Washington, D. C., Baltimore, Md. and points in North Carolina within 160 miles of Victoria, Va.; of sugar and canned goods from Baltimore, Md. to Danville and Martinsville, Va.; and of malt beverages from Newark, N.J. to Red Oak, Va., with return of empty malt beverage containers to points of origin.

[3] Section 5(2) reads (in part) as follows:

"(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subsection (b)—

(i) * * * for any carrier, or two or more carriers jointly, *to purchase*, lease, or contract to operate the properties, or any part thereof, of another;—

(b) Whenever a transaction is proposed under subparagraph (a), *the carrier or carriers or person seeking authority therefor shall present an application to the Commission*, and thereupon the Commission * * * shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the finding specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. *If the Commission finds that, subject to such terms*

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Prior to the entry of the aforesaid order appellant protested its issuance on the ground that by a contract with Stuart, which antedated Stuart's contract to sell to Fleming, appellant had "purchased" the identical operating rights which Stuart sold to Fleming. Although appellant had filed no application with the Commission seeking authority to purchase the rights involved, it requested the Commission to hold a public hearing on the Stuart-Fleming application so as to afford it an opportunity to be heard on the question whether Stuart had sold these rights to appellant. By its report and order of June 18, 1948, the Commission found that authority granted under Section 5 of the Act is permissive only; that it is not a court vested with authority to interpret and enforce the terms of contracts involving the sale of operating rights; and that a public hearing was not necessary to dispose of the Stuart-Fleming application.[4]

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and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable." (Italics supplied.)

Section 5(4) provides:

"It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) • • •."

Section 5(11) provides:

"The authority conferred by this section shall be exclusive and plenary • • •."

[4] "Wiley represents that on December 11, 1947, the vendor made a prior offer to sell to it the rights involved herein, and that it has instituted litigation for specific performance of

With respect to appellant's insistence that, since it had purchased the Stuart rights, the Commission should not and could not have approved the transfer of these rights to Fleming, appellees submit that the alleged contract was an executory contract only and there was never even an attempted executed transfer by Stuart of the operating rights to appellant. Moreover, there could have been no effective transfer of those rights to appellant without the permission of the Commission. Interstate Commerce Act, Sec. 5(2), (4).

While the Stuart-Fleming application was pending before the Commission and before its order had been entered approving the purchase by Fleming of the Stuart operating rights, appellant filed an equity suit against Stuart in a court of the State

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that offer. It requests that under these circumstances the instant application be assigned for hearing to determine whether vendor's operating rights were sold to Wiley. Wiley has filed no application with this Commission seeking authority to purchase the considered rights. We have repeatedly stated that authority granted under former section 213 and present section 5 is permissive only, and may or may not be exercised by the parties, and that all matters involving the interpretation of contracts and the enforcement of the terms thereof must be left for settlement between the parties themselves or by the courts. See *Raymond Bros. Motor Transp., Inc.—Purchase-Berzel*, 15 M.C.C. 477, *Yellow Cab Transit Co. (Oklahoma)—Merger*, 25 M.C.C. 543, *Harris Bros. Transfer Co.—Purchase—Glosson-Hancock*, 25 M.C.C. 645, *Marcell—Purchase—Flemings*, 39 M.C.C. 5, *Lancaster Transp. Co.—Purchase—York-Buffalo M. Exp.*, 39 M.C.C. 579, and *Marion Trucking Co., Inc.—Purchase—Harwood Trucking*, 45 M.C.C. 377. We are convinced that the record supports the conclusion that approval of the transaction would be consistent with the public interest, and that under the circumstances a public hearing is unnecessary to dispose of the issues presented" [p. 3].

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of Virginia, seeking specific performance of its alleged contract. Appellant then requested the Commission to withhold action on that application pending determination of its suit for specific performance. Although the Commission proceeded to enter its order authorizing and approving the transfer of the operating rights to Fleming before final determination was made by the State Court of appellant's suit for specific performance, it did delay final and definitive action by withholding the issuance of a certificate of public convenience and necessity to Fleming until appellant could establish in the State Court its rights, if any, to the Stuart operating authority.

The State Court dismissed appellant's suit, holding that it could not decree specific performance. Appellant was permitted to and did transfer the cause to the law side of the court, where it proceeded as an action for damages arising from a breach of contract. The case was heard before a jury, and a money judgment in the amount of $300 was awarded in favor of appellant against Stuart, which became final prior to the hearing before the three-judge court or the release by the Commission of the certificate of public convenience and necessity to Fleming.

Appellees submit that, as the district court held, the decision of the Virginia Court is *res adjudicata* in its determination, from which no appeal was taken, that appellant was not entitled to specific

performance by Stuart of the Stuart-Wiley contract, and that all of appellant's rights under this contract became merged in the final money judgment.

Appellant made no allegations either before the Commission or in the district court that the action of the Commission in approving the transfer was not in the public interest, that it was not within the scope of Section 5(a) of the Act, or that the terms and conditions of the purchases were unjust or unreasonable as between the parties. Yet such allegations furnish the only basis upon which appellant could predicate a claim to relief before the Commission or the Court. The primary concern of the Commission in this and similar proceedings is the protection of the public interest, and the courts have held that a strong showing must be made before an order of the Commission will be set aside.[5]

Congress has delegated to the Commission broad and exclusive administrative discretion in passing upon consolidations, mergers, leases, purchases and contracts to operate common carriers subject to the Act.[6] The Commission's authority over such matters was made "exclusive and plenary" and in-

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[5] *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 87-89; *Texas* v. *United States*, 292 U. S. 522; *Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, 547-549; *Alton Railroad Co.* v. *United States*, 315 U. S. 15, 23; *Virginia Stage Lines* v. *United States*, 48 F. Supp. 981, affirmed 329 U. S. 668.

[6] *Virginia Stage Lines* v. *United States*, *supra*.

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dependent of all other state and federal authority (Section 5(11)). The purpose was to authorize voluntary arrangements for the acquisition of control of carriers, provided that the Commission should find such arrangements to be consistent with the public interest. The Commission made such a finding [7] in approving the transfer of the Stuart operating rights to Fleming. Nothing more was necessary to satisfy the requirements of the Statute.

Appellees submit that this appeal involves no substantial questions. Appellant's arguments as revealed by its Jurisdictional Statement are simply reiterations of arguments previously rejected by the Commission and the three-judge district court, addressed to matters lying within the discretion of the Commission. Appellant's position is predicated entirely upon the assumption that it purchased the Stuart operating rights prior to

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[7] "We find that the purchase by John C. Fleming, Jr., doing business as Fleming's Transfer, of the operating rights of Stuart Lumber Corporation, upon the terms and conditions above set forth, which terms and conditions are found to be just and reasonable, is a transaction within the scope of Section 5(2) (a), and will be consistent with the public interest, and that, if the transaction is consummated, John C. Fleming, Jr., doing business as Fleming's Transfer, will be entitled to a certificate covering the operating rights confirmed in No. MC-310; which rights are herein authorized to be unified with rights otherwise confirmed in him, with duplications eliminated; *provided, however,* that, if the authority herein granted is exercised, John C. Fleming, Jr., doing business as Fleming's Transfer, shall immediately write off the amount assigned to his "Other Intangible Property" account as a result of the instant transaction, such write-off to be accomplished in the manner to be determined upon submission of the journal entries proposed to record and purchase as required by our order herein" [pp. 3-4].

the transfer of those rights by Stuart to Fleming and that the Commission could not authorize and approve the transfer of its operating rights to Fleming without appellant's consent. That this assumption is wholly untenable has been clearly shown. Whatever rights appellant had were satisfied by the recovery of a money judgment in the State Court which was allowed to become final. The State Court judgment was not a confirmation of the sale of the operating rights to appellant, but rather an award of damages for failure to sell after an agreement to do so.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

NOVEMBER 1949.

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DECEMBER 19, 1949.*

Per Curiam Decisions.

No. 464. O. C. WILEY & SONS, INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Western District of Virginia. *Per Curiam:* The motion to affirm is granted and the judgment is affirmed. *W. G. Burnette* for appellant. *Solicitor General Perlman* and *Daniel W. Knowlton* for appellees. Reported below: 85 F. Supp. 542.

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